Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Survey Kuching Division & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–100 OF 2008
ABU SAMAH, MOHD HISHAMUDIN AND AZHAR MA'AH JJCA
18 JANUARY 2012

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Civil Procedure — Trial — Cross-examination — Written cross-examination of witnesses — Whether trial judge erred in allowing trial to be conducted by way of written statements

C

Native Law and Custom — Land dispute — Native customary rights (NCR) over land — Whether lands were native customary land — Whether customary law allowed for sale or transfer of lands held under NCR to someone from outside their community or district — Whether court had jurisdiction to change native customary law to avoid injustice — Federal Constitution Ninth Schedule State List, List II Items 2(a) & (b)

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The first and second respondents had issued two documents of title over an area of land situated in the Matang Land District ('the lands') in favour of the fourth respondent. The appellant, an Iban by race and native of Sarawak, claimed native customary rights ('NCR') over the lands that now belonged to the fourth respondent. The appellant contended that the issuance of the documents of title to the fourth respondent was null and void in law because it had impaired his NCR. The appellant also claimed that the third respondent had trespassed onto his lands and caused extensive damage to his property. The appellant had thus filed an action against the respondents claiming, inter alia, a declaration that he had acquired NCR over the lands, a declaration that the respondents had impaired his rights, compensation from the third respondent for the damage to his lands and general, exemplary and aggravated damages. The first and second respondents denied that the appellant had acquired any NCR over the lands. The trial judge found that the appellant had not adduced any evidence of any customary practice that enabled a native holding land under NCR to transfer his land or rights thereunder to a third party. Hence the High Court dismissed the appellant's claim with no order as to costs. This was the appellant's appeal against that judgment. The appellant claimed to have fulfilled those conditions of the Iban community that would legally entitle him to assert his NCR over the lands. The appellant also submitted that there had been no extinguishment of those NCR by the first and second respondents before the lands were alienated to the fourth respondent. The first and second respondents submitted that the appellant in this case, an Iban from a

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community in central Sarawak, had in effect acquired NCR from a community in Western Sarawak, and that according to the Native Court of Appeal individual customary rights were not transferable by sale or otherwise for a value, to someone from outside their community or district.

Held, dismissing the appeal with costs of RM10,000 to the first and second respondents, and costs of RM5,000 to each of the third and fourth respondents:

(1) Based on the grounds of judgment of the trial judge and the submission of the parties it was found that in Iban custom there were only two modes by which NCR may be acquired, namely, by felling a virgin jungle and planting crops on it, or by gift or inheritance. This court was legally bound to take judicial notice of this customary law which had been consistently established by the Native Court of Appeal in Sarawak, which held that individual customary rights created or acquired by natives through the practice of their customs could not be transferred for value or to someone from outside their community or district (see paras 18 &19).

(2) By virtue of Items 2(a) and (b) of List II (State List) of the 9th Schedule of the Federal Constitution and Item 13 of List IIA (Supplement to State List for states of Sabah and Sarawak) read with arts 74(2) and 95B(1)(a) of the same, only the State Legislature of Sarawak had the power to change native customary law (see paras 20–23).

(3) The appellant's submission that the trial judge had erred in allowing the trial to be conducted on the basis of the written cross-examination of witnesses was a non-issue. From the grounds of judgment it was clear that the parties had agreed to the mode of the trial and the manner in which evidence was to be adduced (see paras 24–25).

[Bahasa Malaysia summary

Responden pertama dan kedua telah mengeluarkan dua dokumen hak milik ke atas satu kawasan tanah yang terletak di Daerah Matang ('tanah-tanah') memihak kepada responden keempat. Perayu, berbangsa Iban dan berasal dari Sarawak, mendakwa hak adat asli ('HAS') atas tanah-tanah yang kini dimiliki oleh responden keempat. Perayu menegaskan bahawa pengeluaran dokumen hak milik kepada responden keempat adalah batal dan tidak sah di sisi undang-undang kerana ia telah menjejaskan HASnya. Perayu juga mendakwa bahawa responden ketiga telah menceroboh tanah dan menyebabkan kerosakan besar kepada hartanah. Perayu, dengan itu, telah memfailkan tindakan terhadap responden mendakwa, antara lain, suatu deklarasi bahawa dia telah memperolehi HAS atas tanah-tanah, satu deklarasi bahawa responden telah terjejas haknya, pampasan daripada responden ketiga bagi kerosakan kepada tanah-tanahnya dan ganti rugi am, teladan dan keterlaluan. Responden pertama dan kedua menafikan bahawa perayu telah memperolehi sebarang

HAS ke atas tanah-tanah. Hakim bicara mendapati bahawa perayu telah tidak mengemukakan apa-apa keterangan mana-mana amalan adat yang membolehkan pegangan tanah anak negeri di bawah HAS untuk memindahkan tanah atau hak di bawahnya kepada pihak ketiga. Oleh itu, Mahkamah Tinggi menolak tuntutan perayu tanpa perintah terhadap kos. Ini adalah rayuan perayu terhadap penghakiman tersebut. Perayu mendakwa telah memenuhi syarat-syarat masyarakat Iban yang secara sah melayakkannya menggunakan HAS ke atas tanah-tanah. Perayu juga berhujah bahawa tidak berlakunya kehilangan HAS oleh responden pertama dan kedua sebelum tanah diberi milik kepada responden keempat. Responden pertama dan kedua mengemukakan bahawa perayu dalam kes ini, seorang Iban daripada masyarakat Sarawak Barat, telah memperolehi HAS daripada masyarakat di kawasan Sarawak Barat, dan bahawa menurut Native Court of Appeal Asli hak adat individu tidak boleh dipindahkan melalui jualan atau sebaliknya bagi suatu nilai, kepada seseorang dari luar komuniti atau daerah mereka.

Diputuskan, menolak rayuan dengan kos RM10,000 kepada responden pertama dan kedua, dan kos sebanyak RM5,000 kepada setiap responden ketiga dan keempat:

(1) Berdasarkan alasan penghakiman hakim bicara dan hujahan pihak-pihak, didapati bahawa dalam adat Iban, terdapat hanya dua cara di mana HAS boleh diperolehi, iaitu dengan penebangan hutan dara dan penanaman tanaman di situ, atau oleh hadiah atau warisan. Mahkamah ini terikat di sisi undang-undang untuk mengambil notis kehakiman undang-undang adat ini yang telah secara konsistennya diwujudkan oleh Native Court of Appeal di Sarawak, yang berpendapat bahawa hak adat individu yang dicipta atau yang diperolehi oleh kaum asli melalui amalan adat istiadat mereka tidak boleh dipindahkan untuk nilai atau kepada seseorang dari luar komuniti atau daerah mereka (lihat perenggan 18 & 19).

(2) Oleh kerana perkara 2 (a) dan (b) Senarai II (Senarai Negeri) Jadual 9 Perlembagaan Persekutuan dan perkara 13 Senarai IIA (tambahan kepada Senarai Negeri bagi negeri-negeri Sabah dan Sarawak) dibaca bersama-sama dengan perkara 74(2) dan 95B(1)(a) yang sama, hanya badan perundangan negeri Sarawak mempunyai kuasa untuk menukar undang-undang adat asli (lihat perenggan 20–23).

(3) Hujahan perayu bahawa hakim bicara telah terkhilaf dalam membenarkan perbicaraan tersebut dijalankan atas dasar pemeriksaan balas bertulis saksi bukanlah satu isu. Daripada alasan penghakiman, ia adalah jelas bahawa pihak-pihak telah bersetuju dengan mod perbicaraan tersebut dan cara bagi pengemukaan keterangan (lihat perenggan 24–25).]

Notes

For cases on cross-examination, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8780–8781.

For cases on legitimacy, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3483–3489.

Cases referred to

Gawon anak Gudun & 2 Ors v G Gujal & Rose (f) bt Buso (OS NO 25 of 1977) (unreported) (refd)

Sat ak Akum & Anor v Randong ak Charareng [1958] SCR 104 (refd)

Sumbang ak Sekam v Engkarong ak Ajah [1958] SCR 95 (refd)

Legislation referred to

Federal Constitution arts 74(2), 93(1)(a), 121, Ninth Schedule, State List II, Item 2(a), (b), List IIA, Item 13

Land Settlement Ordinance (Cap 26)

Sarawak Land Code (Cap 81) ss 5(2), 10, 202

Appeal from: Civil Suit No 22–11 of 2002–II (High Court, Kuching)

Mekanda Singh Sandhu (Kalveet Singh Sandhu and Satinder Singh Sandhu with him) (Sandhu & Co) for the appellant.

JC Fong (Saferi bin Ali) (State Legal Officer, Attorney General's Chambers Kuching) for the first and second respondents.

Abang Halit bin Abang Malik (Loke, King, Goh & Partners) for the third respondent.

Bexter Michael (EE & Lim Advocates) for the fourth respondent.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court of Sibu delivered on 30 April 2008 wherein the appellant's claim against the respondents was dismissed with no order as to costs.

FACTUAL MATRIX

[2] The appellant (plaintiff in the court below), an Iban by race and native of Sarawak, claimed that he had acquired native customary rights (NCR) over three different areas and category of lands listed as follows:

(a) eight parcels of native customary land (NCL) totalling approximately 37.24 acres at Sungai Agas, 13th Mile, Matang, by virtue of eight sale and purchase agreements which he had entered into with various persons who themselves had acquired native customary rights over the said parcels of land by virtue of Iban customs;

(b) Lot 34 measuring 2.94 acres marked and shaded green on the map attached to the statement of claim which in 1986 was cultivated with cocoa under a Cocoa Scheme and thereafter in 1991 turned into cattle rearing farm under SEDC Adoption Scheme; and

(c) Lots 1, 2 and 3 (34 acres) shaded red on the said map, by virtue of a letter of authority issued by the Forest Department, Sarawak to Pet Rocks Malaysia, a firm wholly owned by the appellant to extract logs or timber therefrom.

[3] On or about April 1993, the first and second respondents issued out two issue documents of title known as Lot 85 and Lot 86, both of Block 1, Matang Land District in favour of the fourth respondent. The said issue documents of title were in respect of areas which cover and/or include the aforementioned plots of land claimed by the appellant.

[4] The appellant's complaint is that, by reason of the issuance of the documents of title to the fourth respondent, his NCR over the plots in question had been impaired and abridged and as such it is null and void in law.

[5] Insofar as the third respondent is concerned, the appellant alleges that the former representing the scouts movement in Sarawak had trespassed onto the said land and thereby causing extensive damage to the property, and thus he claims compensation for these damage.

[6] In making the above claims, the appellant contends that the laws of Sarawak, in particular, the Sarawak Land Code (SLC) and its predecessors had recognised NCR over lands. The appellant further contends that as NCR lands are untitled, the claimant's right is proven by cultivation, farming and/or occupation. This, according to the appellant, is in accordance with native customary law of his community ie Iban community. The appellant having fulfilled these conditions is legally entitled to assert his NCR over the lands in question. It is further contended that alienation of these lands to any person such as the fourth respondent cannot be done unless NCR had been extinguished, surrendered or compensation had been paid to the owners of such land. In the instant case, no extinguishment had been made or exercised by the first and second respondent over the land in question; nor was there any compensation paid to the appellant.

[7] Following the aforementioned events alleged to have taken place, the appellant filed an action in the High Court claiming against the respondent, inter alia:

(a) a declaration that he has acquired customary rights (NCR) over the said first and/or second and/or third plots of land;

(b) a declaration that his rights precludes the first, second, third and fourth respondents from impairing or abridging his rights;

(c) a declaration that the areas of land over Lots 85 and 86, Block 1, Matang Land District issued to the fourth respondent, in as far as those areas encroach onto his said plots of land is null and void to that extent;

(d) a declaration that the third respondent and/or its servants or agents had trespassed onto the said plots of land; and

(e) general exemplary and aggravated damages.

[8] In response to the appellant's claim above, the first and second respondents stated their defence as follows:

(a) the first and second respondents deny that there were any native customary rights created and/or acquired prior to the 1 January 1958 by any persons over the parcels described in paras 4(a) and (b) of the statement of claim and such rights still subsist;

(b) the first and second respondents say that no permit was issued under s 10 of the Land Code (Cap 81) of Sarawak or any other written law to any person to occupy and exercise any rights or privileges over the parcels described in paras 4(a) and (b) of the statement of claim;

(c) prior to 1 January 1958, native customary rights were recognised only in respect of matters set out in the Land Settlement Ordinance (Cap 26) of Sarawak;

(d) the appellant's action against the first and second respondents is statute barred by virtue of s 202 of the Land Code (Cap 81) of Sarawak; and

(e) Lot 86 which encompassed in the third parcel was formerly part of Sempadi Forest Reserve and ceased to be a forest reserve on 7 August 1964 vide Government Gazette Notification No Swk LN 145.

THE APPEALS

[9] On the facts of the case and the evidence put to the fore the learned judicial commissioner made his finding as follows ie:

> that the plaintiff has not adduced any evidence of any customary practice that enables a native holding land under NCR to 'transfer' his land or rights thereunder to a third party.

[10] Apparently, the basis of this finding by the learned judicial commissioner is derived from the concept of 'occupation by a native of land is to sustain his native rights thereto, so as to occupy the same as licensee of the

government' which is in line with s 5(2) of the Land Code (Cap 81) of Sarawak which provides and spells out methods by which native customary rights may be acquired. Conceptually a native having lawfully acquired NCR over land occupying the same as licensee of the government must occupy the said land continuously, meaning that he cannot part with possession thereof.

[11] In *Sumbang ak Sekam v Engkarong ak Ajah* [1958] SCR 95, the Native Court of Appeal held that 'individual customary rights are not transferable by sale or otherwise for value'. In another case, *Sat ak Akum & Anor v Randong ak Charareng* [1958] SCR 104, the same court again held that land held by a Dayak individual under NCR cannot be transferred.

[12] The above decisions by the Native Court of Appeal which is the highest court in the native court system in Sarawak is the reflection of the 'adat' and custom or body of customs to which the law of Sarawak gives effect. In this regard there are regulations and administrative procedures laid down by the government pertaining to disposal of NCR land. They are to be found in Secretariat Circular No 12/1939. The spirit and philosophy of this circular is 'to record and protect these customary rights and to prevent the various communities from improverishing themselves by disposing lightly of their rights to others, whether alien or natives' (para 1 of the circular).

[13] Our attention is also drawn to other provisions of the said circular which to our mind are highly pertinent and relevant to the issues at hand. Paragraph 3(iii) states that 'individual ownership is limited by customary rights of the community to a say in the matter of disposal to anyone outside the community'.

[14] Then there is also para 9 which makes provision for setting up of a village council that is to be appointed as circumstances permit to represent each community. The duties of this village council as spelt out in para 10, inter alia:

> To approve or disallow all proposed voluntary dealings in land by members of the community subjected to the usual right of appeal.

[15] By the abovementioned provisions, it is to be understood that transfer of land held under native customary tenure must be approved by the village council. Talking about 'voluntary dealings' as mentioned in para 10 above, surely the village council in considering whether or not to approve any transfer by members of a native community would require some form of documentary proof that would support the dealing.

[16] The learned state legal counsel drew our attention to the fact that the appellant in this appeal is from Julau and his parents came from the same place.

A However, the land claimed by the appellant to have been acquired by way of sale and purchase agreements are at Sungai Agas, 13th Mile, Matang, Kuching. According to learned state legal counsel further this is a case of an Iban from a community in Julau (Central Sarawak) acquiring native customary rights from a community in Kuching District (Western Sarawak). The question that would B seem to arise from this scenario is whether the customary law of the Iban community in any area/district allow for sale or transfer of individual plot of land held under NCR, by sale and purchase agreements to another individual who is from outside the area/district albeit he is also an Iban. The answer to this is to be found in the aforementioned case of *Sumbang ak Sekam v Engkarong ak* C *Ajah* which had ruled that individual customary rights are not transferable by sale or otherwise for value.

[17] In the same case the Native Court of Appeal went on further to rule that if any purported dealing in land by way of a sale and purchase agreement is D declared to be invalid, in such a case the and would revert to the longhouse and come under the disposition of the 'tuai rumah'.

[18] In *Gawon anak Gudun & 2 Ors v G Gujal & Rose (f) bt Buso* (OS NO 25 of 1977), which was reported in land cases (1969–1987) at p 124, Tan Chiaw E Thong J held:

> In my judgment, having regard to the relevant decisions in the cases of *Sumbang ak Sekam v Engarong ak Ajah* [1958] SCR at p 95 and *Sat ak Akum & Another v Randong ak Charareng* [1958] SCR at p 104, it is clear that such a sale is legally F ineffectual and not legally recognised. … In the light of these two authorities, it seems clear and I hold that the purported sale and transfer of native customary rights over the said land by Lang ak Nyalong to the second respondent for value is not legally effectual. Hence, in my view, the second respondent cannot claim any rights over the said land by virtue of such purported sale and transfer.

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[19] Further perusal of the learned judicial commissioner's grounds of judgment and submission by both counsel, it is also our understanding that by a concept and system called 'Tusun Tunggu' in so far as it relates to Iban custom there are only two modes by which customary rights may be acquired. One is H by felling a virgin jungle and planting of crops thereon so as to create 'temuda', while the other is by gift or inheritance.

[20] From the above, it is clear to us that in the light of what had been decided by the native court, this court is legally bound to take judicial notice of I the customary law that have been clearly and consistently established by the aforementioned judgment of the Native Court of Appeal in Sarawak with the bottom line that individual customary rights created or acquired by natives through the practice of their customs cannot be transferred for value or to someone from outside their community or district.

[21] There is, however, one other interesting and pertinent point raised in the submission of the parties that merits consideration by this court. It is whether this court has jurisdiction to change native customary law in order to be in abreast with the changing of time and the reality of the situation so as to avoid injustice, unreasonableness and oppression.

[22] In this regard our attention is also drawn to art 121 of the Federal Constitution which provides, inter alia, that 'the High Courts and inferior courts shall have such jurisdiction as may be conferred by or under federal law'.

[23] We are also referred to Items 2(a) and (b) of List II (State List) of the Ninth Schedule of the Federal Constitution and Item 13 of List IIA (Supplement to State List for States of Sabah and Sarawak) read with arts 74(2) and 95B(1)(a) of the same. By virtue of these provisions, only the State Legislature of Sarawak can legislate on (a) native reservations and land tenure, and (b) native law and customs, including, inter alia, the determination of native law and customs.

[24] In the light of the above, it is our view that we are unable to consider the appellant's proposition that the court has the power to change native customary law. The power lies with the State Legislature of Sarawak.

[25] Quite apart from the merit of the substantive appeal, learned counsel for the appellant before us also raised issues on points of procedure. Learned counsel complained that the cross-examination of witnesses in the trial was not done in accordance with established procedure. It was submitted that the learned judicial commissioner was wrong in allowing the trial to be conducted on the basis of written cross-examination of witnesses and such procedure contravened the established civil procedure on the conduct of such cases. This, according to counsel further has led to miscarriage of justice.

[26] On this issue we had perused the grounds of judgment of the learned judicial commissioner and spotted the following passage, that reads:

> Preliminaries:
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> At the commencement of the action, parties have agreed that the case can be heard by way of (i) witness statement for examination in draf, (ii) preliminary cross-examination by witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination), (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination.

[27] In the light of the above passage, we hold that the appellant's complaint

in this regard is a non-issue as parties have clearly agreed to the mode of the of the trial and manner in which evidence is to be adduced.

[28] For reasons stated above we see no merit in the appellant's appeal, as such we dismissed it with costs of RM10,000 payable to the first and second respondents.

[29] As for the appeal against the third and fourth respondent, by reason of our decision in respect of the first and second respondent above, we hold that such appeal is groundless and without merit, and therefore dismissed it with costs of RM5,000 to each of the respondents.

Appeal dismissed with costs of RM10,000 to first and second respondents, and costs of RM5,000 to each of third and fourth respondents.

Reported by Kohila Nesan